III. LOCALITIES MAY CHARGE RENTS FOR USE OF THE PUBLIC RIGHTS-OF-WAY TO PROVIDE NON-CABLE SERVICES, AND MAY REQUIRE CABLE OPERATORS TO OBTAIN FRANCHISES TO USE PUBLIC RIGHTS-OF-WAY TO PROVIDE NON-CABLE SERVICES.

A. Summary.

This section addresses the questions raised by the Commission in ¶¶ 101-105 of the NPRM as to how the classification of cable modem service as an interstate information service affects local authority to require a franchise, local authority to manage the public rights-of-way, and local authority to charge a fee for use and occupancy of the public rights-of-way to provide non-cable services. ALOAP concludes that (a) localities have the right to charge a fee for use and occupancy of the public rights-of-way to provide non-cable services and (b) the classification of the service does not affect local authority to franchise use of the public rights-of-way, or to manage use of the public rights-of-way. The sections that the Commission relies upon to suggest that no additional authority may be required (Sections 621 and Section 624, 47 U.S.C. §§ 541 and 544 respectively) do not support that proposition. In fact, Section 621 as well as the legislative history suggest that an operator who wishes to provide non-cable communications service may be required to obtain additional authorizations.[54] *See* Part IV.D., *infra*.

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preempting. It also does so without the slightest evidence that there is a problem that needs to be addressed, and indeed (as shown above) with affirmative evidence in its own reports that there is no problem. For the Commission to preempt local authority in the face of these defects would thus be arbitrary and capricious. *Home Box Office Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977).

[54] See H.R. Rep. No. 98-934 at 29 ("H.R. 4103 preserves the regulatory and jurisdictional status quo with respect to non-cable communications services"); at 60 ("The Committee intends that state and federal authority over non-cable communications services under the status quo shall be unaffected by the provisions of Title VI."); at 63 ("It is the intent of subsection (d) that, with respect to non-cable communications services, both the power of any state public utility commission and the power of the FCC be unaffected by the provisions of Title VI. Thus, Title VI is neutral with respect to such authority.")

B. Local Governments Are Justified in Franchising Cable Operators to Use and Occupy the Rights-Of-Way to Provide Non-Cable Services Because Operators Are Burdening the Public Rights-Of-Way in Different Ways to Provide Non-Cable Services.

Before examining the particular issues raised by the Commission, two factual points must be emphasized.

1. Franchises are often service-limited by agreement. The franchises issued by local governments to cable operators are often service-specific. As almost all franchises in force today are the product of negotiation under 47 U.S.C. § 546(h)(the informal renewal provisions of the Cable Act), the scope of a franchise is a reflection of the result of that negotiation.

Broadly speaking, franchises take two different approaches to service authorization. In some cases, the final franchise authorizes the cable operator to use and occupy public rights-of-way to provide cable services and other non-cable communications services. Under this type of franchise, a single document will be a reflection of the locality's authority under Title VI, and its authority under state law and the local charter. An example of this type of franchise is the franchise for Madison, Wisconsin. In Sections 19.1 and 19.2 of that franchise, the parties agreed that the franchisee had authority under the franchise "to provide Cable Modem Services and that the revenues from Cable Modem Service shall be included in gross revenues for the purpose of computing and paying Franchise fees." The authorization does not depend on the Cable Act's definition of cable service, nor does the payment of fees turn on whether cable modem service is a cable service or not. The authorization and the fee payment for cable modem service are distinct from the authorization and fee requirement with respect to cable service.

The second approach is reflected in the Ventura, California, franchise. There, the cable franchise authorizes the operator to use and occupy public rights-of-way to provide cable services only. In order for the cable operator to use and occupy the public rights-of-way to

provide non-cable communications services, it must obtain such additional authorizations as are required under local law. In Ventura, at the same time that the cable franchise was issued, the operator entered into an agreement which permitted it to use and occupy the public rights-of-way to provide non-cable communications services, subject to the payment of fees (in this case, the level of fees was in part tied to the fees paid by other, similar users of the public rights-of-way). In Ventura, there is a documentary separation between the cable service grant and fee and the non-cable service grant and fee; but the practical result is the same as in Madison: the operator is free to provide the services it chooses to provide, subject to agreed conditions.[55]

The approach taken by municipalities serves an important competitive interest. While there can be substantial variation from state to state, in general, in order for a company to install facilities in public rights-of-way to provide only information services, an authorization from the local franchising authority is required.[56] While some states exempt common carrier telephone facilities from local franchising requirements,[57] very few, if any, exempt facilities-based information service providers from those requirements in cases where no telecommunications services are involved.[58] At least if state law does not prevent it, the entity may be required to pay

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[55] By obtaining a separate authorization, the cable operator is in a position to ensure that he is treated no worse than other companies providing similar services, while the City is in a position to ensure that the operator gains no competitive advantage by virtue of the grant of the franchise to provide cable service.

[56] *See, e.g.*, San Francisco Administrative Code § 11.3.

[57] *See, e.g.*, California PUC Code § 7901.

[58] The Public Utility Commission of Texas explained this distinction in its Comments in Docket No. 02-33, *In the Matter of Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, filed Feb. 15, 2002, "Additionally, the Texas PUC believes that the classification of wireline broadband Internet access services as information services could possibly reduce the Texas PUC's regulatory authority over municipal franchise fees for the use of public rights-of-way. In 1999, the Texas Legislature passed House Bill 1777 (HB 1777) which authorized the Texas PUC to develop a uniform method for calculating municipal franchise compensation for access to public rights-of-way by Certified Telecommunications Providers (CTPs). The Texas PUC points out that the classification of wireline broadband Internet access service as an information service may prevent these providers from gaining

a fee for use of the public rights-of-way. By charging cable operators for use and occupancy of the public rights-of-way when providing information services, local governments ensure that facilities-based non-common carrier providers of information services are able to compete fairly and effectively.

2. The facilities required to provide cable modem service place significant additional burdens on the public rights-of-way. While not determinative of local franchising, management or fee authority, it is important to understand that the construction associated with providing non-cable services is substantial, and that the work places substantial additional burdens on the public rights-of-way.[59] The CTC Report, *see* Exhibit G, concludes that "cable modem service burdens the public right-of-way significantly more than does video-only cable service, because modem service requires a far more elaborate cable system than does video."[60] Among other things: upgrading cable systems to provide cable modem service often requires installation of additional and significantly larger power supplies and electronic equipment cabinets.[61] In addition, in order to provide adequate upstream capacity for non-cable services, the operator will typically install more nodes, and more fiber.[62]

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access to public rights-of-way pursuant to the state-appointed municipal franchise fee formula offered to CTPs under HB 1777."

[59] *See* Andrew Afflerbach, David Randolph, "The Impact of Cable Modem Service on the Public Right-of-Way," June 2002 (the "CTC Report"), attached hereto as Exhibit G. Columbia Telecommunications Corporation is an engineering firm that specializes in advising local governments in cable television and other communications-related matters. The firm is a leading expert in the design of institutional networks and cable television technology generally. The CTC Report was prepared for the purpose of these comments, and illustrates the differences in network architecture between a cable service-only system and a system designed and built to provide cable modem services as well as video services.

[60] *Id.* at 1.

[61] *Id.* at 10-11.

[62] *Id.* at 19.

Beginning in the 1990's and continuing today, cable operators have engaged in extensive construction in the public rights-of-way as they have upgraded their systems so they could provide cable modem services. As the CTC Report confirms, none of this extensive construction would be necessary simply to provide video-only services.[63] In other words, cable modem systems are different from cable-only systems, impose greater burdens on local governments and make more extensive use of public property. It is therefore reasonable for local governments to expect additional compensation for the use of their property.

In addition, operators often complain that the facilities that must be installed are different from those installed to provide video programming, and cannot be underground, or can only be partially undergrounded. Thus, communities which have strictly enforced undergrounding requirements for purposes of economic development and public safety are being asked to carve out exceptions to the rule for cable operators so that cable operators can provide non-cable services.[64] Furthermore, operators do not simply provide cable modem service to video programming subscribers. In Montgomery County, Maryland, for example, cable modem service is offered as a standalone service,[65] and so some facilities and equipment are being installed that are used solely to provide non-cable services.

C. Cable Modem Service Includes Services Which are Cable Services.

By its terms, 47 U.S.C. § 542 reaches *all* revenues derived from the operation of a cable system to provide cable services. What happens, then, when cable services are bundled with

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[63] *Id.* at 20.

[64] *See id.* at 16 ("cable modem upgrades have shifted most of the equipment burden from private property and the to the public ROW [I]t may be more cost effective for a cable operator to locate its hubs in underground vaults in the public right-of-way than in profit oriented buildings.")

[65] *See* Etter Decl.

non-cable services? The 1984 Cable Act's legislative history makes it clear that *bundling* does not transform a cable service into a non-cable service.

> [T]he manner in which a cable service is marketed would not alter its status as a cable service. For instance, the combined offering of a non-cable shop at home service with service that by itself met all the conditions of a cable service would not transform the shop at home service into a cable service or transform the cable service into a non-cable communications service.

1984 U.S.C.C.A.N. at 4681. Therefore, 47 U.S.C. § 542 by its terms reaches revenues from cable modem service because (as the Commission recognizes), cable modem service includes cable services. As broadband technology evolves, it is expected to provide an alternative means for delivery of video services and other services that fit well within the definition of cable service. Indeed, the very structure of the cable modem service – very wide capacity downstream and limited capacity upstream – suggests that the service may be of particular interest to those who wish to take advantage of services, such as streaming video services, that allow the user to receive a form of video on demand.[66] Today, operators are selling video and modem services in combination;[67] in the future, as a practical matter, the modem service may include or subsume the video services. In either case – whether the operator sells an explicit bundle of "cable services" and "non-cable services" or sells a single product that includes both, under 47 U.S.C. § 542(b), localities are entitled to compensation.[68]

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[66] *Broadband Bringing Home the Bits*, *supra* at 98-99.

[67] *See* Declaration of Andrew Etter, attached hereto as Exhibit F.

[68] The phrasing of 47 U.S.C. § 542(b) is odd. It does not state that localities may levy a fee only on "cable service revenues." It states a fee may be levied on revenues derived from the "operation" of the cable system to provide cable service. The Telecommunications Act's legislative history states that the section "does not restrict the right of franchising authorities to collect franchise fees on revenues from cable services and *cable-related* services," H.R. Rep. No. 104-204, at 93 (1995). Given the nature of cable modem service and the way it is marketed, all revenues from the service could properly be treated as "cable-related."

D. The Cable Act Permits Cities To Charge Fees For Use and Occupancy of Public Rights-Of-Way To Provide Non-Cable Services.

1. Past practice.

At ¶ 105, the Commission concludes that revenue from cable modem service is not to be included in the calculation of franchise fees. It bases this decision on the plain meaning of Section 622(b), as amended by the 1996 Act. As even the Commission should recognize, however, prior the adoption of the 1996 Telecommunications Act, cable operators were obligated to pay a franchise fee on all revenues of the cable system, including cable modem service.

Before 1996, the franchise fee permitted under 47 U.S.C. § 542(b) reached the "cable operator's gross revenues derived...from the operation of the cable system." The Telecommunications Act of 1996 amended that section so that the franchise fee reached the "cable operator's gross revenues derived...from the operation of the cable system *to provide cable services*." We believe there is no real dispute that under the pre-1996 version of the Cable Act, a franchise fee could be charged on cable modem service. The question is whether Congress meant to prohibit fees on cable modem service and other non-cable services when Section 622 was amended in 1996. The cable industry would no doubt like to read the provision to prohibit all fees on non-cable services, whether those fees are imposed pursuant to Section 622(a) or not. But, the legislative history points to a different result: Congress intended, at a minimum to allow localities to require fees on non-cable services as permitted under their general state and local law authority, not to prohibit fees altogether. The Congressional concern was that, absent the additional language, operators might be required to pay a fee on telecommunications services even where a fee could not otherwise be levied consistent with 47 U.S.C. § 253(c). The law, in other words, permits localities to continue to charge fees for use of the public rights-of-way to provide non-cable services subject only to limits that apply under 47

U.S.C. § 253(c) to telecommunications services. Not only is this interpretation consistent with the plain language of the Act and with the legislative history of the amendment to Section 622, but it is the only interpretation that avoids raising significant constitutional issues.

2. The legislative history.

The 1996 amendment to Section 622 was designed to draw a line between telecommunications services and other services provided via a cable system. The former would be subject to fees under 47 U.S.C. § 253, not Title VI:

> Subsection (b) amends section 622(b) of the Communications Act by inserting the phrase "to provide cable services." This amendment makes clear that the franchise fee provision is not intended to reach revenues that a cable operator derives for providing new telecommunications services over its system, but only the operator's cable-related revenues.

H.R. Conf. Rep. No. 104-458, at 180 (1996).[69]

The Report also states:

> The conferees intend that, to the extent under state and local law, telecommunications services, including those provided by a cable company, shall be subject to the authority of a local government to, in a non-discriminatory and competitively neutral way, manage its public rights-of-way and charge fair and reasonable fees.

H.R. Conf. Rep. No. 104-458, at 180 (1996).

Representative Dingell was even more explicit:

> Mr. Speaker, I want to say a few special words about the concerns of our local elected officials ... This conference agreement strengthens the ability of local governments to collect fees for the use of public rights-of-way. For example, the definition of the term "cable service" has been expanded to include game channels and other interactive services. This will result in additional revenues

[69] *See also* 652(c)(2)(B), which states that "an operator of an open video system under this part may be subject to the payment of fees on the gross revenues of the operator for the provision of cable service imposed by a local franchising authority or other governmental entity, in lieu of the franchise fees permitted under section 622." This, along with section 253, supports the proposition that Congress did not intend for anyone to escape regulation or compensation, and in fact ensured that every known technology of the time would have to pay compensation.

> flowing to the cities .... At the same time state and local governments retain their existing authority to impose fees on telecommunications providers, including cable companies that offer telecommunication services.

142 Cong. Rec. H1156 (Statement of Mr. Dingell) (February 1, 1996).

The report suggests that in Congress' view, operators would either be providing (a) telecommunications services subject to a fee under Section 253 or (b) services covered by the fee provided for in Section 622(b). But at the very least, the 1996 amendments make it clear that Congress did not intend to prohibit fees on the provision of services that fell outside the ambit of Section 622(b), and instead intended to allow localities to charge such fees under state and local law – *in the exercise of their traditional authority, unaffected by the limitations of Title VI.*[70]

3. The text of the Act confirms that additional fees are permitted.

The statute is designed to allow additional fees to be levied under non-Title VI authority. Section 622(g), 47 U.S.C. § 542(g), makes it clear that a fee is not a "franchise fee" subject to the 5% franchise fee cap unless it is imposed upon the "cable operator...solely because of its status as such." A City that could charge a fee for use and occupancy of public rights-of-way by an entity that constructed a facility to provide only information services can charge a fee to a cable operator who engages in that same activity; the fee is imposed on the operator not because of the operator's status as a provider of cable services, but because the operator is using the public rights-of-way to provide non-cable services. The exceptions set out in Section 622(g)(2), 47 U.S.C. § 542(g)(2) confirm the point. Those exceptions allow states and localities to require operators to pay fees similar to those paid by others who are plainly not subject to Title VI. Hence, the 5% franchise fee limit does not apply to taxes, fees or assessments "of general applicability," including taxes, fees and assessments "imposed upon both utilities and cable

operators or their services..." The notion reflected in the exceptions is that operators are subject to any number of nondiscriminatory fees that are not exclusively levied on cable operators. Thus, a local government or locality could charge both a cable franchise fee, and a fee on revenues from telecommunications services (or any other services) consistent with these provisions.

4. This construction is compelled by Section 601.

Reading the Act to permit localities to levy a fee on cable modem service is compelled by Section 601(c) of the Telecommunications Act of 1996, which states that the statute "shall not be construed to modify, supersede or impair any federal, state or local law unless expressly so provided." Implied preemption is, in other words, prohibited.[71] Neither Section 622 on its face, nor the legislative history states that local governments can only charge franchise fees for cable services. One therefore cannot leap from the narrow result compelled by the change to Section 622 to imply a broad preemption of local authority to charge fees.

E. Basic Principles of Constitutional Law Require The Commission to Recognize Local Authority To Charge Fees.

1. State and local authority to regulate the use of public land is an essential attribute of state sovereignty.

Justice O'Connor wrote in *New York v. United States*, 505 U.S. 144, 187 (1992) that "some truths are so basic that, like the air around us, they are easily overlooked." One such truth is that state and local governments have dominion and control over state and municipal public

[70] The focus on telecommunications services suggests that, in Congress's view, information services *would* be treated as cable services.

[71] H.R. Conf. Rep. No. 104-458, at 201 (1996). As introduced in H.R. 1555, this provision was originally limited to "Parts II and III of Title II of the Communications Act." *See* H.R. 1555, 104th Cong. (1995) at 124, introduced May 3, 1995, but this limitation was later eliminated, making it applicable to the entire bill.

lands, including public rights-of-way.

In the preeminent case on federalism, *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), the Court announced the doctrine of enumerated powers: the federal government may exercise only the powers delegated to it in the Constitution, and the states and the people reserved all powers not enumerated or reasonably implied. *Id* at 384-88. In 1858, the Court explained the fundamental notion of federalism: dual sovereignty. "The powers of the general government, and of the state, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres." *Ableman v. Booth*, 62 U.S. (21 How.) 506, 516 (1858).

As early as 1818, the Court held that a state's right to control the property within its own borders was an essential part of its sovereignty as a state.[72] *United States v. Bevans*, 16 U.S. (3 Wheat.) 336, 386-87 (1818). In the seminal case of *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845), the Supreme Court was "for the first time . . . called upon to draw the line that separates the sovereignty and jurisdiction of the government of the union, and the state governments," over the ownership of and jurisdiction over land. *Id.* at 220. In a dispute between parties claiming title under separate state and federal grants, the Court held that the land was the property of the state, not the federal government, so that only the State had the authority to grant the land. *Id.* at 230. The Pollard Court held that the federal government's exercise of a power of municipal sovereignty over lands within a state would be "repugnant to the Constitution." *Id.* at 224.

> This right of eminent domain over the shores and the soils under the navigable waters, for all municipal purposes, belongs exclusively to the states within their respective territorial jurisdictions, and they, and they only, have the constitutional power to exercise it. To give to the United States the right to transfer to a citizen

[72] A state may be able to limit local authority to recover fair market value for use of the public rights-of-way (depending upon state law), but the point here is that the federal government does not have the authority to intrude upon those state-local rights.

> the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of state sovereignty, and deprive the states of the power to exercise a numerous and important class of police powers.

Id. at 230.

In *Hicks v. Bell*, 3 Cal. 219 (1853), the Supreme Court of California confidently held:

> In reference to the ownership of the public lands, the United States only occupied the position of any private proprietor, with the exception of an express exemption from State taxation. The mines of gold and silver on the public lands are as much the property of this State, by virtue of her sovereignty, as are similar mines in the lands of private citizens. She has, therefore, solely the right to authorize them to be worked; to pass laws for their regulation; to license miners; and to affix such terms and conditions as she may deem proper, to the freedom of their use. In her legislation upon this subject, she has established the policy of permitting all who desire it, to work her mines of gold and silver, with or without conditions; and she has wisely provided that their conflicting claims shall be adjudicated by the rules and customs which may be established by bodies of them working in the same vicinity.

If the free-handed regulatory authority found in *Hicks v. Bell* has been eroded by steady expansion of Congress' Commerce Clause authority over the last 150 years, the underlying premise remains as true as ever. "Ownership of submerged lands--which carries with it the power to control navigation, fishing, and other public uses of water--*is an essential attribute of sovereignty*." *United States v. Alaska*, 521 U.S. 1, 4 (1997) (emphasis added).

2. State and Local Governments are entitled to recover the fair market value of state- and locally-owned land.

Virtually all of the cases that address sovereign authority in respect of publicly-owned land arise from the needs of government (whether federal, state or local) to exploit a valuable resource—public land—for the public benefit. Government at all levels has always exploited public land ownership through arrangements as varied as the possible combinations of the different sticks in bundle of rights entailed in the ownership of property will allow. In New York, as early as 1789, an act of the legislature was passed, exempting the discoverers of gold and

silver mines from paying to the people of the State as sovereign thereof, any portion or dividend of the yield, for the space of 21 years from the time of giving notice of the discovery; and forbidding the working of the same after the expiration of that term. See 1 Laws of New York, 124. In 1827, another act was passed, which declares that all mines of gold and silver discovered, or hereafter to be discovered, "within this State, shall be the property of the people of this State, in their right of sovereignty." *See* 1 Revised Statutes, 281.

State and local authority to exact reasonable "rental" compensation from private commercial entities for their use of local public property for private economic gain is unambiguous; and it is not limited to the exploitation of mineral rights. *St. Louis v. Western Union Tel. Co.*, 148 U.S. 92 (1893); *Postal Tel. Cable Co. v. City of Newport*, 76 S.W. 159 (Ky. 1903); *Western Union Tel. Co. v. City of Richmond*, 224 U.S. 160 (1912); *Postal Tel.-Cable Co. v. City of Richmond*, 249 U.S. 252 (1919). One turn-of-the-century case construing the applicability of a federal law to a telegraph company's use of local public property framed the issue explicitly in terms of the parity of proprietary rights in private and public property:

> The Congress of the United States has no power to take private property for public purposes without compensation, and it can no more take the property of a state or one of its municipalities than the property of an individual. The acts of Congress . . . conferred on the defendant [telecommunications company] no right to use the streets and alleys of the city . . . which belonged to the municipality.

Postal Tel. Cable Co. at 160.

The one exception to the sovereign authority of state and local governments to obtain fair market value from the use of their publicly owned property proves the rule, as it is embedded in the Constitution itself. The Tonnage Clause, U.S. Const. art. I, § 10, Cl. 2, has been construed to prohibit "all taxes and duties regardless of their name or form . . . which operate to impose a charge for the privilege of entering, trading in, or lying in a port." *Clyde Mallory Lines v. State of*

Alabama, 296 U.S. 261, 265-66 (1935). The provision was added to the Constitution by the Framers, in part, according to the Supreme Court, because the Framers had "doubts whether the commerce clause would accomplish that purpose." *Id.* at 265. Owing to this constitutional impediment, in this one context States are limited to the recovery of costs associated with servicing vessels and policing their ports. Outside of that limited context, States have far greater discretion to exact compensation for the use of public property. Consequently, any limitations on local government discretion to require compensation arise out of state law, not federal law.

Even where Congress has broadly preempted State and local *regulation*, it has carved out an exception for laws relating to the exercise of sovereign rights over property. *See, e.g.*, *California v. FERC*, 495 U.S. 490, 496-499 (1990) (affirming construction of section 27 of the Federal Power Act to protect proprietary activities). That is, the Commerce Clause – and law adopted pursuant to it – may act to broadly preempt local authority to *regulate* a particular interstate activity, but may not compel the state to dedicate property to that activity, or grant rights in state property, or forego compensation for use and occupancy of property.

3. Commission Preemption of the Right to Charge a Fee for the Use of Public Property to Provide Information Services Would Raise Significant Issues Under the Fifth Amendment.

In 1903, the Kentucky Supreme Court insisted that "the Congress of the United States . . . can no more take the property of a state or one of its municipalities than the property of an individual." *Postal Tel. Cable Co.* at 160. Eighty years later, the Supreme Court erased any doubt, holding the Fifth Amendment "encompass[es] the property of state and local governments when it is condemned by the United States." *U.S. v. 50 Acres*, 469 U.S. 24, 31 (1984).

The property added to a cable system to provide cable modem service significantly increases and alters the burden on public property, as we have already shown.[73] The Commission would be granting that right to use and occupy public property in the face of agreed contracts that define the nature and purposes for which state and local property may be occupied. It is physical occupancy that is at issue here – and physical occupancy always raises significant takings issues. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426-27 (1982). The property at issue is extraordinarily valuable in strictly financial terms: According to a recent paper compiled for TeleCommUnity, an alliance of local governments and their associations that advocate for local governments' interests on matters of federal telecommunications and broadband legislation, the value of the public rights-of-way ranges from a conservative $3.5 trillion to a potential of $10.9 trillion.[74] Applying the lowest corridor enhancement factor now employed by appraisers suggests the value is $7.1 trillion. These results are consistent and conservative when measured against comparable transactions reported by federal government agencies, including the U.S. Department of Transportation, the National Oceanic and Atmospheric Administration, and the Bureau of Economic Analysis.[75]

Hence, preempting local authority to charge rents for use and occupancy of the public rights-of-way to provide cable modem service would raise significant Fifth Amendment issues. Those issues cannot be avoided by pointing to Section 622, and concluding that Congress (a) authorized cable operators to use public property for any purpose; and (b) set the price for use. In a takings context, the legislature cannot both commandeer property and then fix the price for

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[73] CTC Report at 2.

[74] *Valuation of the Public Rights-of-Way Asset*, TeleCommUnity Alliance, March 2002, *available at* http://www.telecommunityalliance.org/images/valuation2002.doc/. *See also Study of Utility Access to City-Owned Right-of-Way*, Texas Municipal League, *reprinted* in NATOA Journal of Municipal Telecommunications Policy, Summer 2000, at 30.

its use. *Monongahela Navigation Co. v. U.S.*, 148 U.S. 312, 327 (1892)("By this legislation, Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial function, and not a legislative question.")[76] And, it would be bizarre to characterize the "rent" authorized as anything but arbitrary, since it would allow an operator who delivered video services via a "cable modem" service literally to reduce rates to near zero -- hardly fair market compensation for use of the public rights-of-way. It would be no more valid than if the federal Bureau of Land Management adopted a regulation prescribing that all state and local mineral leases of public land be deemed to *authorize* the extraction of lead for a royalty; and, at the same time, to *permit* the *unauthorized* extraction of gold for free. The difference is obvious from an examination of the estimated, immediate impact of the Commission's cable modem Declaratory Ruling. By conservative estimates, the Commission Ruling is reducing compensation for use of the public rights-of-way this year by about $284 million, and within a few years, local government lost revenues will be over one-half a billion dollars annually.[77]

4. Commission Preemption of State and Local Laws Requiring Compensation for the Use of Public Property to Provide an Information Service Could Raise Significant Tenth Amendment Issues.

It is additionally questionable whether Congress can regulate states or localities outside of the context of "generally applicable laws" consistent with the Tenth Amendment. "Most" of the Supreme Court's Tenth Amendment jurisprudence "[has] concerned the authority of Congress to subject state governments to generally applicable laws." *New York v U.S.*, 505 U.S.

[75] *Id.* at 5.

[76] If, on the other hand, the federal government is purporting to regulate the property of the states, and to establish the terms and conditions under which that property may be used, significant Tenth Amendment issues would be raised.

[77] *See supra* at 25.

144, 160 (1992); *see also South Carolina v. Baker*, 485 U.S. 505, 514 (1988). In *Reno v. Condon*, 528 U.S. 141, 151 (2000), the Court expressly reserved "the question whether general applicability is a constitutional requirement for federal regulation of the States." The proposed administrative preemption of state law at issue exceeds, or at least touches the outer boundaries of federal power, *inter alia* because it is not generally applicable and because it commandeers state and local public property in the service of a federal regulatory program.

The commandeering of public property in service of a federal regulatory program is no less offensive to the sovereignty of state government than the commandeering of its legislative processes. *New York* at 161.

5. *The Constitution therefore requires that the Cable Act be read to permit localities to charge franchise fees if there is any possible reading of the statute under which such charges would be permissible.*

There are, in short, enormous constitutional issues that would be raised if the Cable Act were read to preempt local authority to charge fees for use and occupancy of the public rights-of-way. Because of that, Supreme Court precedent makes it clear that the Cable Act must be read to permit localities to charge fees unless there is *no possible* reading of the statute under which such charges could be permitted. Thus, for example, *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991), held that intrusions on traditional state authority will only be given effect when a statute's language makes the Court "absolutely certain that Congress intended" such a result. The rule, described by Professors William Eskridge and Philip Frickey as "super-strong,"[78] "increases Congress's political accountability by forcing it to state explicitly a decision to erode state authority and reduce the benefits of federalism—such as 'decentralized government that [is] more sensitive to the diverse needs of a heterogeneous society [and that] increases opportunity

for citizen involvement in democratic processes' that accrue to the polity."[79] Particularly given the impact on basic infrastructure and on the public of the upgrades associated with providing cable modem service it is fair to expect that had Congress meant to intrude so extraordinarily into state sovereignty it would have done so directly – and taken the responsibility for the results.[80] It did not do so, and therefore the Constitution requires that the Act be construed to preserve local authority to charge a fee for use and occupancy of the public rights-of-way to provide information services if at all possible:

> Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg & Constr. Trades Council*, 485 U.S. 568, 575 (1988). This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority. *See ibid.* Thus, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *DeBartolo* at 575.

Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159, 173 (2001). *See also, I.N.S. v. St. Cyr*, 533 U.S. 289, 299-300 (2001) ("[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' *see Crowell v. Benson*, 285 U.S. 22, 62 (1932), we are obligated to construe the statute to avoid such problems. *See Ashwander v. TVA*, 297 U.S. 288, 341, 345-48 (1936)

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[78] William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand. L. Rev. 593, 623(1992)

[79] Jack W. Campbell, *Regulatory Preemption in the Garcia/Chevron Era*, 59 U. Pitt. L. Rev. 805, 816 (1998).

[80] The Commission's decision to announce that cable operators need not pay fees, at the same time that it tells consumers to look to local governments for protection against cable modem abuses, is an unfortunate example of a federal agency passing the buck in two senses – telling consumers to look to local

(Brandeis, J., concurring); *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909).") Here, as we have shown, reading the statute to permit localities to charge fees on cable modem service is entirely *consistent* with Congressional intent.

6. *The Internet Tax Freedom Act does not affect the right of localities to charge rent for use of the public rights-of-way, and the fees challenged here are in the nature of rents, not taxes.*

The Commission suggests that Congressional concern with taxes on Internet service as reflected in the Internet Tax Freedom Act, Pub. L. No. 105-277, Div. C, Title XI, §§ 1100-04, 112 Stat. 2681, 2681-719 (1998), 47 U.S.C. § 151 nt, may somehow justify preemption of fees for use and occupancy of the public rights-of-way to provide cable modem service. NPRM ¶ 105. That is not so.

First, the Internet Tax Freedom Act is about taxes, not rents. It does not purport to limit charges for use and occupancy of public property. While the Commission has confused the distinction between a tax and a charge for use and occupancy of the public rights-of-way in the past, there should be no doubt at this point: a franchise fee is not a tax.[81] Second, to the extent that it refers to cable systems at all, the Internet Tax Freedom Act assumes that cable modem

governments for protection, while taking the bucks from local government required to provide that protection.

[81] See *City of Dallas v. FCC*, 118 F.3d 393, 397-98 (1997) ("Franchise fees are not a tax, however, but essentially a form of rent: the price paid to rent use of public right-of-ways. *See, e.g., City of St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92, (1893)(noting that the fee paid to a municipality for the use of its rights-of-way were rent, not a tax)"). State courts have reached the same conclusion. *See, e.g., Southwest Gas Corp. v. Mohave County*, 937 P.2d 696, 700 (1997) ("A franchise being akin to a lease, it arguably follows that a county should be able to charge rent as consideration for the use allowed."); *City of Little Rock v. AT & T Communications of the Southwest, Inc.*, 318 Ark. 616, 888 S.W.2d 290, 292 (1994) (franchise fees are rental payments for use of municipal right-of-way); *Berea College Util. v. City of Berea*, 691 S.W.2d 235, 237 (Ky.App.1985) (franchise fee is rental for the use of city streets); *Pacific Tel. & Tel. Co. v. City of Los Angeles*, 44 Cal. 2d 272, 282 P.2d 36, 43 (1955) (franchise fee is "not a tax" but "compensation for the privilege of using the streets and other public property within the territory covered by the franchise").

services are cable services, and are subject to franchise fees. The Act goes out of its way to state that such fees would remain perfectly valid.[82] If anything, contrary to the Commission's suggestion, the Internet Tax Freedom Act suggests that Congress understood that localities were charging rents for use of the public rights-of-way to provide cable modem service, and that Congress believed that practice was lawful.

7. It is sound public policy to allow communities to charge fair market value for property used.

Arguments above show that the Commission cannot prohibit localities from charging fees for the use and occupancy of public rights-of-way to provide cable modem service, regardless of the wisdom of that practice. However, it is worth emphasizing that it is good public policy to charge private companies fair value for property used.

This Commission has long recognized that requiring communications companies to pay fair market value for the inputs used in their business encourages competition and economic deployment of resources. The Commission's spectrum auction, for example, generated huge revenues for the Treasury, but the effect was to encourage competition and deployment, rather than discourage it. The Commission concluded:

> "the competitive bidding process provides incentives for licensees of spectrum to compete vigorously with existing services, develop innovative technologies, and provide improved products to realize expected earnings. In this way, awarding spectrum using competitive bidding aligns the licensees' interests with the public interest in efficient utilization of the spectrum. As one commenter observes, "[s]uccessful bidders are those that not only place a high value on the property relative to other auction participants, but also have the financial capability to support their bids." [83]

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[82] § 1104(8)(b) specifically excludes franchise fees from the tax definition.

[83] *FCC Report to Congress on Spectrum Auctions*, WT Docket No. 97-150, Report, FCC 97-353, at § IV(B)(1997).

The same is true with respect to charging for use of public rights-of-way: allowing localities to charge fair value will not discourage use of the public rights-of-way if an enterprise is sound; but it will discourage uneconomic uses.

Indeed, the recent problems in the broadband industry generally have been exacerbated by over-investment. The last thing the industry needs is an incentive to misallocate resources.[84] Charging fair market value for the use of rights-of-way will help companies make more rational investment decisions. As the Third Report notes at ¶ 62:

> "there has been a recent slowdown in investment caused by the economic downturn generally, and more particularly, over-building by carriers, over-manufacturing by vendors, over-capitalization by financial markets, coupled with unrealistic market expectations by investors. [Analysts] conclude that, although it will take some time for the industry to absorb excess bandwidth capacity and increase utilization of existing assets, the recent slowdown in investment has not been caused by a slowdown in consumer demand."

Charging fees for use of the public rights-of-way prevents what would otherwise be substantial subsidies running from the public to cable operators. The industry consistently underestimates costs associated with use of the public rights-of-way. The costs involve far more than the direct costs of overseeing public right-of-way construction (costs associated with permitting and inspecting, for example), coordinating public right-of-way construction (police supervision and traffic control) and responding to construction-related complaints. Construction reduces the life of the roadway,[85] reduces the space available in the roadway to others, makes

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[84] *See* Brian Leaf, *Battling Waves of Woe: Once high-flying industry getting swamped,*" Crain's Chicago Business, Feb. 25, 2002 ("As companies rushed to install fiber optic cables – the autobahn of the new economy – they went overboard. Now, the capacity glut has cost telecom companies billions of dollars, with no forseeable return on their investment."); Jeff Smith, *Fiber-Optic Fallout; Billions Were Wasted in Frenzy to Build Networks, 90% of which lie Dormant,* Rocky Mountain News, May 6, 2002, at 1B; Jon Healey, *Telecom's Fiber Pipe Dream,* Los Angeles Times, April 1, 2002, at A1 ("The problem was that too many companies had the same dream, and they built too many digital toll roads to the same destination.")

[85] Ghassan Tarakji, San Francisco State University, The Effect of Utility Cuts on the Service Life of Pavements in San Francisco: Study Procedure and Findings (1995); IMS, Infrastructure Management

coordination of public projects more difficult (and expensive) and often damages vital utility infrastructure in ways that may not be detected until much later. As importantly, construction imposes significant, uncompensated costs on the public. In some cases, those costs are as simple (and as significant) as delays in traffic and damage to vehicles,[86] but in other cases, critical access routes to local businesses are cut off.[87] In some cases, the impact can be fairly described as disastrous.[88] The University of Minnesota has concluded that installation of utility infrastructure imposes substantial costs on the public.[89]

While the problems described above are not unique to cable, it is also true that the upgrade of cable systems to provide cable modem service places substantial additional strain on public and private property, as we discuss *infra*. Unless local governments, as trustees of the public right-of-way, can charge a fair market rent for cable operators' use and occupancy of the

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Services, Inc., Estimated Pavement Cut Surcharge Fees for the City of Anaheim, California Arterial Highway and Local Streets (1994).

[86] Lyndsey Lawton, *Hidden Cost of Road Tear-ups: D.C. Taxpayers Struck With Bill for Trench-Weakened Streets*, The Washington Post, March 15, 2000, at A1.

[87] Lyndsey Lawton, *Despite Promises, Road Work Still Chaotic, Only 1 Cut Coordinated Out of 507 Permitted*, The Washington Post, August 13, 2000, at C1; Lyndsey Lawton, *Mayor Vows to Bring Order to Street Work; Longer Moratorium on Trenches Is Possible*, The Washington Post, March 28, 2000, at B1.

[88] Joanna Glasner, *High Bandwidth Bureaucracy,* Wired News, March 25, 1999; Rachel Horton, *City Urges Conservation After Water Line Slashed,* Irving News, July 11-14, 1999, at 1A.; Rani Cher Monson and Melissa Borden, *3,600 Lose Emergency Phone Service*, Arlington Morning News, July 16, 1999, at 1A; Stephen C. Fehr, *Road Kill on the Information Highway*, The Washington Post, March 21, 1999, at A1; Jim Hannah and Cindy Schroeder, *Fiber-optic cut disrupts business computers snarled in Kenton Co.*, The Cincinnati Enquirer, February 28, 2001; Blake Morrison and Amy Mayron, *Buried Stone May Have Caused Break Submerged Block Diverted Auger to the Side, Piercing Gas Line*, St. Paul Pioneer Press, December 13, 1998, at 1A.

[89] Raymond L. Sterling, University of Minnesota, Indirect Costs of Utility Placement and Repair Beneath Streets (1994).

public right-of-way to provide cable modem service, a direct subsidy will run from consumers to the industry.[90] There is no possible reason to allow such a subsidy.

F. The Fact That A Service Is An Information Service Does Not Affect Local Authority To Manage Public Rights-of-Way or To Require Franchises.

Much of the foregoing analysis with respect to the right to charge fees is also applicable to local rights to require franchises or other authorizations for the provision of cable modem service. A franchise is property, and property rights are defined by state law. *See, e.g., McKay v. U.S.*, 199 F.3d 1376 (Fed. Cir., 1999) ("The trial court was correct to look to Colorado law to determine if a there was a property right that could be violated, since the Fifth Amendment protects rather than creates property interests."); see also, *Board of Regents of Colleges v. Roth*, 408 U.S. 564, 577 (1972) (existence of a property interest is determined by reference to "existing rules or understandings that stem from an independent source such as state law"); *Phillips v. Washington Legal Found.*, 524 U. S. 156 (1998) (Inasmuch as Federal Constitution protects rather than creates property interests, existence of property interest is determined by reference to existing rules or understandings that stem from independent source such as state law.); *U.S. v. Lee*, 232 F.3d 556 (7th Cir. 2000) (Court of Appeals looks to state property law to determine whether a defendant's interest in a marital home was a property interest subject to forfeiture.); *Wilson Industries, Inc. v. Aviva America, Inc.*, 185 F.3d 492 (5th Cir. 1999) (For purpose of action brought under jurisdiction of Outer Continental Shelf Land Act (OCSLA), the laws of each adjacent state are the law of the United States for that portion of the Outer Continental

[90] Consumers should not be forced to pay such a subsidy. A recent economic analysis of cable modem service indicated that federal intervention on behalf of the cable modem industry is unnecessary and would most likely have anti-competitive effects. Jerry A. Hausman, Gregory Sidak, and Hal J. Singer, *Cable Modems and DSL: Broadband Internet Access for Residential Customers*, The American Economic Review 302, 307 (2001)("Cable firms are positioned to dominate the broadband industry as they have dominated the delivery of multi channel video programming.")

Shelf); *Palm Beach Isles Associates v. U.S.*, 208 F.3d 1374 (Fed. Cir. 2000) (Title to the beds of navigable waters of the United States is either in the state in which the waters are located, as a matter of state sovereignty, or in the owners of the land bordering the waters; whether in the one or the other is a question of state law). As a matter of state law, there is certainly nothing extraordinary about granting rights for specific purposes, and requiring additional authorizations where a grant is to be used for a different purpose; as we have shown this is a common practice in the cable industry.

Thus, the question is whether federal law *must* be read to supersede state law and to somehow (a) generally permit information service providers to use sovereign state property without authorization to install facilities; or (b) permit cable operators, in particular, to avoid authorization requirements that apply to those who would use public rights-of-way to provide information services merely because they hold a franchise to provide cable services.

As to the first point, the information services/common carrier services distinction was initially drawn to draw a line between pure transport common carrier services, which would be regulated, and other services, which would not be subject to regulation. The distinction was intended to describe the bounds of the Commission's Title II authority, and to incidentally guide the exercise of state authority over intrastate communications by wire. *Id.* There was never any suggestion that the Commission ever intended, or ever thought it had the authority, to exclude information service providers from the obligation to pay for, and obtain permission to use property that did not belong to them. There is nothing in the Telecommunications Act that somehow transforms the *regulatory* distinction and grants property rights to information service providers. To the extent that the Telecommunications Act addresses local property interests, it preserved them, as the Commission has recognized. *In the Matter of Classic Telephone*,

Memorandum Opinion and Order, 11 FCC Rcd 13,082 , 13, 097 at ¶28 (1996)(Section 253 permits localities to require franchises for use and occupancy of the public rights-of-way); *City of Dallas v. FCC,* 165 F.3d 341, 348 (5th Cir. 1999)(localities may require open video systems to obtain franchises).

Nor is there anything in the Cable Act that would require the Commission to conclude that cable operators are somehow entitled to, or should be accorded, a special exemption from franchising requirements that may apply to entities that wish to place non-carrier facilities in the public rights-of-way to provide information services.

The Cable Act recognizes that cable systems can be used to provide non-cable communications services. However, as we explained above, the Cable Act was specifically structured to maintain the *status quo* with respect to the treatment of information service providers. *See, e.g.* 47 U.S.C. § 541(d)(2) (nothing in Act shall be construed to affect state authority to regulate cable operator provision of non-cable communications services provided over a cable system). Congress plainly contemplated that additional authorizations might be required to provide such services. See H.R. Rep. No. 98-934, at 29 ("H.R. 4103 preserves the regulatory and jurisdictional status quo with respect to non-cable communications services"); at 60 ("The Committee intends that state and federal authority over non-cable communications services under the status quo shall be unaffected by the provisions of Title VI"); at 63 ("It is the intent of subsection (d) that, with respect to non-cable communications services, both the power of any state public utility commission and the power of the Commission be unaffected by the provisions of Title VI. Thus, Title VI is neutral with respect to such authority"). Furthermore, Congress re-emphasized this point in 1996, when it adopted amendments to Section 621. Section 621(b)(3)(A), 47 U.S.C. § 541(b)(3)(A), provides that a cable operator engaged in the

provision of *telecommunications services* "shall not be required to obtain a franchise under this title for the provision of telecommunications services." That provision would have been wholly unnecessary had Congress believed that a grant of a franchise inherently exempts a cable operator from a duty to obtain additional authorizations to provide services other than cable services. The reference to "under this title" is also significant. The phrase was added just before the adoption of the Telecommunications Act, and was intended to protect local authority to require franchises for the provision of telecommunications services if permitted under state law. That is, Congress preserved the general right to require franchises under state law; only the right to require a franchise to provide telecommunications services as a part of a cable television franchise based solely on Title VI was eliminated. The Conference Report explains: "The conferees intend that, to the extent permissible under State and local law, telecommunications services, including those provided by a cable company, shall be subject to the authority of a local government to, in a nondiscriminatory and competitively neutral way, manage its public rights-of-way and charge fair and reasonable fees." It is impossible to imagine that Congress somehow intended to create a broader implied exemption from franchising for cable operators acting as information service providers than it explicitly created for cable operators acting as telecommunications service providers.

The sections the Commission relies upon to draw its tentative conclusion that additional authorizations may not be required are not to the point. The Commission relies on Section 624(b) – but as we have already explained, that provision does not act to broadly preempt local authority to franchise the provision of information services. What is notable is Section 624(f), which states that a franchising authority may not establish requirements "regarding the provision or contents of cable service, except as provided in this title." There is comparable, if not stronger

language regarding telecommunications services in Section 621(b). There is no similar language with respect to information services.

The Commission also points to Section 621. The Commission states that section "authorizes local franchising authorities to require cable operators to obtain a franchise to construct a cable system over public rights-of-way. Once a cable operator has obtained a franchise for such a system, our information service classification should not affect the right of cable operators to access rights-of-way as necessary to provide cable modem service or to use their previously franchised systems to provide cable modem service."[91] That conclusion depends on the scope of the franchise, and as we have already explained, franchises can be and are often service-limited. Particularly in light of the significant constitutional issues that would be raised by a different approach, *see discussion supra,* nothing in the Cable Act can reasonably be interpreted to prevent a locality from issuing a franchise to use and occupy the public rights-of-way to provide cable services, and requiring a distinct authorization to use and occupy public rights-of-way to provide other services.[92]

IV. THE COMMISSION NEED NOT ASSERT JURISDICTION OVER FRANCHISE FEES PAID ON CABLE MODEM SERVICE.

A. Summary of Section.

This section addresses issues raised by the NPRM at ¶¶ 106-107, which ask whether the Commission can or should assert jurisdiction over franchise fees collected on cable modem service in the past. The question is misguided, for it presumes that the past collections were

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[91] NPRM at ¶ 102.

[92] This result is hardly surprising in light of the broad definition of the term "franchise" in the Cable Act. The term includes "any amendments, modifications or collateral agreements directly ancillary to such authorization." Thus the Act envisions that a "franchise" could actually be composed of several distinct grants which collectively define the rights and obligations of the cable operator.

unlawful; but in any case (a) state law doctrines will resolve any issues that may arise with respect to those payments; and (b) there is not a single, simple approach to resolving past payment issues, even if one assumes that the Telecommunications Act of 1996 prohibits payment of franchise fees on cable modem service.

B. State Law Adequately Resolves Any Past Payment Issues.

Recovery of payments is not a new issue, but one in which state and local governments have long-standing experience.

Under the "Voluntary Payment" doctrine, voluntary past payments may not be recovered from a local government even where a court invalidates the local law which required those payments. The general rule is that "in the absence of fraud, imposition, undue influence and the like, money paid to a municipality with a full knowledge of the facts, but under a mistake of the law, cannot be recovered." McQuillin Mun Corp § 49.62 (3rd ed. 2000). While this issue most often arises in the context of tax payments, the principle that voluntary payments are not recoverable has been applied to other types of payments such as building permit fees, inspection fees, mortgage liens and even criminal fines. *See, e.g., Beachlawn Building Corp. v. City of St. Clair Shores*, 370 Mich. 128 (Mich. 1963)(building permit fees); *Oubre et al. V. City of Donaldsonville*, 131 So. 293 (La. 1930)(inspection fees); *Cook v. City of Shreveport*, 144 So. 145 (La. Ct. App. 1932)(mortgage lien); *Draper v. Grant*, 205 P.2d 399 (Cal. Ct. App. 1949) (criminal fines).

This doctrine depends in large part on the dealings between the parties, and as such, cases applying the doctrine are decided on a case-by-case basis. But state law provides an adequate basis for resolving any issues that might arise – assuming past payments *were* unlawful (a point ALOAP disputes).

C. Past Payments Were Lawful In Any Case.

But setting aside applicable state law doctrines, there is no issue here that requires the Commission's intervention. While it is true that, in some cases, fees were collected on the assumption that cable modem service was a cable service, this is at most a technical defect; as we have shown above, a fee could have been imposed on non-cable services independent of the fee levied pursuant to Section 622(b) without running afoul of the Cable Act's franchise fee limit. The Commission's finding that the parties were acting in good faith should be sufficient to insulate operators and municipalities for any potential liabilities resulting from this type of error.

As importantly, the Commission's question assumes that the Telecommunications Act of 1996 operated to invalidate contractual provisions in franchises requiring the payment of a franchise fee on cable modem services – even where the franchise provision had been adopted *prior to* the adoption of the law. The contract rights obtained by local governments in such cases were very valuable; and had the franchising authorities not obtained the consideration provided for in the contract, it is very likely that they would have taken it in other, permissible forms – such as in the form of PEG capital, and more sophisticated institutional networks, for example. *See, e.g.* 47 U.S.C. § 542(g). Franchises might have been shorter – much shorter. Unless there is a clear indication that Congress meant to undo this arrangement – effectively making the provision retroactive so that the benefits that were granted were preserved, while the compensation that supported that benefit was modified – it must be assumed that Congress did not intend to alter the terms of existing contracts until those contracts expired.

Finally, and again assuming *arguendo that fees on cable modem service are prohibited altogether,* even for pre-1996 franchises, whether the fees would be unlawful would depend on a number of specific, individual factors which the Commission cannot assess – including whether the 5% cap is being exceeded. Some communities collect less than the federally permitted 5%

maximum, and in those communities, the fact that a franchise fee is being collected on cable modem service is legally insignificant under any interpretation of the law – unless the fee on cable modem service and cable service combined exceed the limit of 5% of gross revenues from the provision of cable service.

V. EFFECT OF CLASSIFICATION ON PRIVACY AND CUSTOMER SERVICE ISSUES

A. Summary of Section.

This section addresses issues raised by ¶¶ 108 (customer service) and 111-112 (privacy). The Commission asked the effect of its classification on local authority over customer service and privacy provisions. ALOAP agrees with the Commission that local authority is not affected by the regulatory classification of cable modem service as an interstate information service.

B. Localities Have Clear Authority To Protect Consumers and Protect Privacy.

As shown in Part II, the Cable Act expressly identifies areas where it intended to limit local authority to regulate services that are not cable services. Both the privacy and consumer protection provisions reserve local and state authority to regulate cable modem services.

As the Commission properly notes, the consumer protection provision broadly permits a locality to establish "customer service requirements of the cable operator," and not just "customer service requirements related to the provision of cable service." 47 U.S.C. § 552(a). More to the point, the statute states that "nothing in this title" preempts state or local authority to protect consumers of cable modem service, except to the extent "expressly provided" in Title VI. 47 U.S.C. § 552(d). There is no express preemption. Indeed, as we explained at the outset, preemption in this area would be *counter-productive*.

The privacy provision by its terms explicitly reaches services in addition to cable services. And, as the Commission also rightly notes, the section expressly reserves local and

state authority with respect to privacy. That authority therefore extends to cable modem service. Preemption in this area would likewise be counterproductive, although local franchising authorities are also well aware that privacy issues surrounding the Internet are complex, and must be handled with sensitivity. One central concern is to ensure that privacy policies are specific, fair, and provided to subscribers before service begins and periodically thereafter. That is something local governments are well-equipped to do. Comcast made news this Spring when it announced policies that subscribers thought would permit it to monitor use of the Internet closely. Comcast responded by announcing that it would not implement such a policy. It is not at all clear that the issue is a dead one, however. In St. Paul, Minnesota, for example, the operator originally issued a privacy policy that explained that it would monitor Internet use and provide information regarding subscriber use to third parties so that advertising could be targeted to cable modem subscribers.[93] Thus, there is reason to be concerned that, absent some oversight, the public's interest in privacy will not be adequately protected.

VI. THE NPRM IS BASED ON MISTAKEN ASSUMPTIONS.

A. The Commission Cannot Mandate Regulatory Parity.

The Commission's approach to the NPRM assumes that Congress intended to promote regulatory parity. For example, at ¶ 85 of the NPRM the Commission asks:

> To what extent should our decision regarding multiple ISP access requirements be influenced by the desirability of 'regulatory parity,' namely the presence or absence of multiple ISP access regimes for other technologies (such as wireline, terrestrial wireless, and satellite) that offer residential high-speed Internet access service?

[93] *See* Letter from David Seykord, MediaOne, to Holly Hansen, City of St. Paul Cable Communications Officer, (March 29, 1999), attached hereto as Exhibit H.